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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1120

JOE WITT and MARCUS WITT, JR.,
Petitioners,

vs.

STATE OF CALIFORNIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

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Petitioners pray that a Writ of Certiorari issue to review the judgment of the Court of Appeal, State of California, Fifth Appellate District, issued on November 21, 1975, affirming Petitioners' conviction of conspiracy.

CITATION TO OPINION BELOW

The opinion of the California Court of Appeal is reported at 53 Cal.App.3d

154, 125 Cal.Rptr. 653, and appears in the Appendix hereto at Pages A-1 through A-24. On January 14, 1976, the Supreme Court of California (the State's highest Court) denied a hearing.

JURISDICTION

The judgment (remittitur) of the California Court of Appeal was issued on January 16, 1976. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3), Petitioners having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether Petitioners were denied due process when they were refused a continuance after the prosecution asked for, and was permitted, to amend the Information during the closing arguments to the jury.

2. Whether massive prejudicial pretrial publicity in the trial court made it impossible for Petitioners to receive a fair trial.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth and Fourteenth Amendments to the Constitution of the United States.

STATEMENT OF FACTS

Petitioners were charged by information with violations of §470 of the California Penal Code (forgery); Count II charged them with preparing false evidence in violation of §134 of the California Penal Code; a third count accused them of conspiracy in violation of §182 of the California Penal Code. Counts I and II were dismissed prior to the case going to the jury, which convicted Petitioners of a single count of conspiracy. After substantial completion of counsel's arguments to the jury, the prosecution's motion to amend Count III of the Information (the conspiracy count) was granted and Petitioners' motion for continuance and to reopen the case were denied.

ARGUMENT

1.

PETITIONERS WERE DENIED DUE PROCESS WHEN THE PROSECUTION WAS PERMITTED TO FILE AN AMENDED INFORMATION AND PETITIONERS WERE DENIED A CONTINUANCE

The proceedings below established that after substantial completion of counsel's arguments to the jury, in the twenty-second day of a jury trial, the prosecution was permitted, over strenuous objection, to file an amended information. Petitioners' oral demurrers were overruled as were their motions for a continuance and to reopen the case. The amended information sought to add a second overt act to the remaining conspiracy count.

The State Appellate Court upheld the amendment of the information on the ground that

> "there were no new legal issues created by the amendment." (A-11).

It may be conceded that the matter of trial continuances is traditionally within the discretion of the trial judge, and

> "it is not every denial of a request for more time that violates due process. . . ."

Ungar v. Sarafite, 376 U.S. 575, 589 (1964). However, the Ungar case recognizes,

> ". . . a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend the counsel an empty formality." Ungar v. Sarafite, supra, 376 U.S. at 589.

Such a "justifiable request" for continuance was established in the trial court by Petitioners. As stated by them in their motion in the trial court for a new trial:

> "Due process of law requires that an accused be advised of the charges against him in order that he may have a reasonable opportunity to prepare and present his defense and not be taken by surprise. . . . In the case at hand, the amended information alleges that defendants

conspired to cheat and defraud certain entities 'by means which are of themselves criminal.' Under the rule of Clenney (People v. Clenney, 165 C. A. 2d 241, 253), this pleading is insufficient and the specific criminal means should have been alleged. . . Under the original information there were counts of violating Penal Code Section 570 and 134 and the case was tried on the theory that violation of these Penal Code Sections were the 'criminal means' alleged in the conspiracy count; and defendants fully expected jury instructions on these crimes. However the amended information was filed after the opening statement of the People on final argument and the final argument of counsel for defendant Marcus L. Witt, Jr.; and the amended information omitted counts charging violations of Penal Code Sections 570 and 134 and therefore there were no jury instructions on these crimes at all and

in fact there was no jury instructions on 'criminal means' at all. Defense counsel had no opportunity to study the amended information in proper fashion and hence, even though given the opportunity of further argument to the jury, were in no real position either to define 'criminal means' to the jury or propose jury instructions on the subject--the People at no time during argument to the jury, explicitly articulated exactly what the criminal means might be. In short, the jury was left to its own devices as to precisely what 'criminal means' might mean."

Petitioners submit that the foregoing, without more, establishes that denial of their request for a continuance denied them due process in violation of the Fourteenth Amendment. Ungar v. Sarafite, supra.

2.

MASSIVE PRE-TRIAL PUBLICITY MADE IT IMPOSSIBLE FOR PETITIONERS TO RECEIVE A FAIR TRIAL IN TULARE COUNTY, CALIFORNIA

As the State Court of Appeal noted, Petitioners made a pre-trial motion for change of venue on the grounds of prejudicial pre-trial publicity (A-17-19). In support of that motion, Petitioners introduced, inter alia, a statement signed by ninety-seven residents of Tulare County, California, asserting that Petitioners could not receive a fair trial in that county (A-19). In addition, Petitioners introduced newspaper clippings evidencing massive pre-trial publicity.

This Court in Sheppard v. Maxwell, 384 U.S. 333 (1966), considered the requisites of due process in the context of massive pre-trial publicity. As stated therein, 384 U.S. at Page 362:

> "From the cases coming here we note that unfair prejudicial news comment on pending trials has become increasingly prevalent. Due process requires that the

> accused receive a fair trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity for the minds of the jurors, the trial courts must take strong measures to insure that the balance is never weighed against the accused. And Appellate tribunals have the duty to make an independent evaluation of the circumstances."

It is submitted that Petitioners' showing was within the ambit of Sheppard v. Maxwell. The statement of ninety-seven residents of a small county, Tulare County, California, that Petitioners could not receive a fair trial established, as a matter of law, reasonable likelihood that a fair trial could not be had in that county. Accordingly, Petitioners were denied "a fair trial by an impartial jury free from outside influences." Sheppard v. Maxwell, supra, 384 U.S. at 362.